No. 632 & 633.

Brief of Bishop for Appt & Pl

Filed May 5, 1898.

Supreme Court of the United States,

OCTOBER TERM, 1897.

THOMAS TIERNEY, *Appellant*,
vs.
ALBERT ERICHSON, *Sheriff, &c.* } No. 632.

AND

THOMAS TIERNEY, *Plaintiff in Error*,
vs.
ALBERT ERICHSON, *Sheriff, &c.* } No. 633.

BRIEF FOR APPELLANT AND PLAINTIFF IN ERROR.

JAMES L. BISHOP,

[redacted]

Evening Post Job Printing House, New York.

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vs.

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THOMAS TINSLEY,
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vs.

ALBERT ERICHSON, Sheriff, &c.

No. 633.

BRIEF FOR APPELLANT AND PLAINTIFF IN ERROR.

Statement of the Case.

The case first above entitled is an appeal from an order of the United States Circuit Court for the Eastern District of Texas, dismissing a writ of *habeas corpus*, and remanding the prisoner to the custody of Albert Erichson, Sheriff of Harris County, Texas.

The second of the above-entitled cases is a writ of error to the Court of Criminal Appeals of Texas, bringing up the final judgment in a proceeding upon *habeas corpus* by which the petition was dismissed and the prisoner remanded to the custody of the same Sheriff.

Each of these proceedings in *habeas corpus* was brought

to determine the validity of the imprisonment of Thomas Tinsley under a commitment issued to the Sheriff of Harris County upon a judgment or order in a proceeding in the District Court of Texas to punish him for an alleged contempt of Court and to compel obedience to an order made by that Court in an action brought by Octavius C. Drew and others, against the Houston Cemetery Company and others, made and dated on the 23d day of April, 1896.

It appears (Case 633, p. 3; case 632, p. 1) that on the date above named Drew and others filed a petition in the District Court of Texas for the 11th Judicial District asking that a Receiver be appointed of the Houston Cemetery Company, which petition shows that the plaintiffs therein sued for the benefit of all the lot owners in said Cemetery, and that the principal purpose of the receivership was to complete a certain bridge in the Cemetery and repair the Cemetery and improve its grounds; it appears also that Thomas Tinsley was the president of the Cemetery Company, and that he with others were made parties defendant in that action and that no Receiver was asked for of his individual property (Case 632, p. 2), and that he contested the appointment of the Receiver. On the same day after notice and argument an order was made appointing William Christian, Receiver (Case 633, p. 13; case 632, p. 18), "of all and singular the property, assets, "rights and franchises of the defendant the Houston "Cemetery Company of every description including all "money, claims in actions, credits, bonds, stocks, lease-"hold interests or operating contracts and other assets of "every kind, and all other property—real, personal or "mixed—*held or possessed by said Company*, and also of "the trust fund described in the plaintiff's petition as "purporting to be loaned to said Company, and secured "by a mortgage deed of trust together with the ac-"cretions thereto since accruing or to accrue; to have and "to hold the same as an officer of and under the orders and "directions of this Court."

The order authorizes and directs the Receiver to take immediate possession of the property above described and

to carry on and to continue the business of the company, and it further provides as follows:

"Each and every of the officers, directors, agents and "employees of the said Houston Cemetery Company are "hereby required and commanded forthwith upon the de- "mand of the said Receiver to turn over and deliver to "said Receiver any books, papers, moneys or deeds or "property or vouchers for the *property under their con- "trol to which such corporation is entitled or which they "hold or control as such officers, directors, agents or "employees.*"

On the 2d of February, 1897, the Receiver demanded of Mr. Tinsley that he turn over certain notes and the minute book and $492.52 in cash (Case 633, p. 3; Case 632, p. 2), and Mr. Tinsley declined to turn over or surrender any of said property to the Receiver "on the ground that "he had a good and perfect right and title thereto and to "keep and possess so much thereof as was in his posses- "sion." Thereupon the Receiver instituted a proceeding to punish him for contempt, and made and served a petition for that purpose (Case 633, pp. 29 to 34; Case 632, pp. 20 to 23), reciting his appointment as Receiver of the property belonging to the Houston Cemetery Company and the direction to the officers, including Mr. Tinsley, the president, to turn over and deliver to him the books, papers, moneys, deeds and other property under their control, to which the company was entitled or which they held or controlled as such officers; that the said company was entitled to moneys belonging to the company then on hand amounting to $3,104.50; to notes and bills receivable, amounting to $1,440.50; to a certain book known as "the Minute Book," also to a certain book known as the "Bank Deposit Book," and also the portion of the trust fund to which the company was entitled is covered by the note of the company amounting to $8,285.51, "and also that portion of said "trust fund which accrued for and during the years 1894 "and 1895, amounting to the sum of $492.52, and also the "sum of $695.00 which arose from the assessments in per- "petuity belonging to said trust fund, but not placed to "its credit as shown by the books of said company"

(Case 633, p. 32; Case 632, page 22); that he had made demand of Mr. Tinsley that he should turn over and deliver to him the moneys, notes, books and funds above specified, and that Tinsley had refused to comply.

Upon this petition an order was made requiring Tinsley to show cause why he should not be punished for contempt in disobeying the decree of April 23rd, 1896, and why he should not be committed for contempt for such disobedience as an aid to the enforcement of the aforesaid decree until compliance by him therewith in the particulars of disobedience and for the payment of the costs of the proceeding (Case 633, p. 33; Case 632, page 24). Tinsley filed an answer to this application setting up certain facts in reference to the first item of $3,104.50 (Case 633, p. 35; Case 632, page 25), which it is not necessary to consider inasmuch as his allegations in reference to this item were sustained. The same is to be said of the items relating to the "Bank Deposit Book," the fund of $695 of assessments in perpetuity and the note for $8,285.51.

As to the remaining items, to wit, the notes of the company, its minute book and $492.52 of its trust fund, the answer asserted that as to the latter item one Wisby, the secretary and treasurer of the company, had misappropriated the fund and converted it to his own use, and that Tinsley had assumed the liability to pay the same, and that as to the other items under date of April 15th, 1896, the Company had given Mr. Tinsley its note for $1,500 as evidence of an indebtedness due to him of $500 for dividends which were due to him and unpaid, and of $1,000 cash advanced to the company to meet its expenses for attorneys' fees and otherwise, and that at a meeting of the Board of Directors held on the 15th of April, 1896, at which a quorum was present, a resolution was passed authorizing the execution of the company's note for $1,500 to the order of Charles Tinsley who endorsed it over to Thomas Tinsley to cover the aforesaid indebtedness and authorizing the delivery to Tinsley as collateral security of the minute book and $1,342.50 of the company's notes, and that he was entitled to hold the collateral security until the payment of this note. The answer also set up that

Tinsley had invested the $492.52 of the trust fund in vendors lien notes and had paid $7.70 to make the investment, and that he was willing to deliver the said notes upon being repaid that sum. The answer was verified February 6th, 1897, and upon the same day the Receiver filed a demurrer, and also an unverified traverse (Case 633, p. 37; Case 632, p. 28), and thereupon the Court on the same day having heard evidence both oral and written in support of the issues made an order (Case 633, p. 25; Case 632, p. 7), adjudging Mr. Tinsley guilty of a contempt in having disobeyed the Court's order of April 23d, 1896, appointing Mr. Christian Receiver of the property of the Cemetery Company, by failing and refusing to turn over to the Receiver (1) the notes specified in a schedule attached to the order amounting on their face to $1,440.50 (2) the book known as the "Minute Book;" (3) the portion of the trust fund which accrued in the years 1894 and 1895 amounting to $492.52; and the Court further adjudged and directed that he pay to the Sheriff of Harris County, Texas,

"a fine of $100 as a punishment for the contempt afore-
"said, and that he forthwith turn over and deliver to said
"William Christian as Receiver aforesaid the said notes,
"minute book and trust fund of $492.52 as an aid to the en-
"forcement of the aforesaid order of April 23d, 1896, and
"that in default of immediate payment of said fine and of
"the delivery and turning over forthwith to said William
"Christian, as Receiver aforesaid, of said notes, minute
"book and trust fund of $492.52, he, the said contemnor,
"Thomas Tinsley, be imprisoned in the common jail of
"Harris County, Texas, until he shall pay the said fine of
"$100 as herein directed and until he shall turn over and
"deliver to said William Christian as aforesaid * * *
"the said notes, minute book and trust fund of $492.52
"and until he shall pay to the Sheriff aforesaid his costs
"for executing the commitment herein or until he shall
"be discharged by the further order of this Court,"

and the Clerk was directed to issue a commitment accordingly (Case, 633, p. 26; Case, 632, p. 8).

It will be observed that the order directed the immediate issuance of the commitment without previous service of the order or decree or demand for compliance, and it will be further observed that the decree varied materially

from the petition upon which it was based, and that as to the larger part of the property to the possession of which it was alleged the Receiver was entitled, and for a failure to deliver which Tinsley was charged to have been guilty of an offence the charge failed, and until the decree was made and served it was impossible for him to know the items which the Court would order him to deliver.

Upon the commitment so issued Tinsley was imprisoned in the county jail at Houston. In March, 1897, he presented a petition in habeas corpus to the Judge who had made the order of commitment, and under date of March 17th, 1897, he declined to issue the writ (Case 633, p. 17). A similar application was made on March 22d, to one of the Judges of the Criminal District Court at Galveston, and was declined (Case 633, p. 17). On the 2d of April, a writ of habeas corpus was issued by one of the Judges of the Court of Criminal Appeals, and came on for hearing, and after argument the writ was dismissed and the prisoner was remanded to the custody of the Sheriff (Case 633, p. 73). An application for a re-hearing was denied (Case 633, p. 74). The petition for the writ will be found at page 2 and the respondent's return at page 21. The petition sets out the matters which have been already stated, and further alleges that applicant never had in his possession certain of the notes which he was required to deliver to the Sheriff (specifying them page 4):

"That the remainder of the notes he held as a private "individual as collateral to the $1,500 note for money "loaned by him to the company, and that he had a per- "fect legal right to the possession thereof. That the "minute book was likewise pledged to him as collateral "security for said loan and that he had a legal right "thereto and to its possession, and that each of these "articles were his private property and not the property "of the corporation; that he is amply solvent and that "the Receiver has a full and complete remedy at law for "the recovery of the property, in case he is legally ad- "judged entitled thereto, but notwithstanding these "facts, he was, peremptorily ordered to turn over the "funds and the books to the Receiver, and that as to the "further sum of $492.52 he had assumed this obligation

"as the debt of Wisby, and that he owed it to the com-
"pany as an individual and private person, and not as an
"officer of the company, and that he was solvent and able
"to respond in case the Receiver should obtain judgment
"against him."

The petition also contains the following statement:

"This applicant further states that his claim to all the
"matters and things above set out was and is made in
"good faith, and that he has the right and does assert the
"right thereto until deprived thereof by due course of
"law, and he says that the proceedings on said motion
"and said judgment is not due process of law, and that
"he ought not and cannot by such proceedings be im-
"prisoned or compelled to turn over said property and
"things for that thereby he is deprived of trial by due
"course of law, and that said judgment and commitment
"are therefore void and his detention thereunder illegal"
(Case, 633, p 5; Case, 632, p. 5).

He further says in his petition that the Court on the hearing adjudged him guilty of contempt and undertook by its judgment to impose upon him a fine of $100 and to imprison him in jail until he should comply with the judgment, and he alleges that the judgment is void as well as the commitment because (1) the Judge was disqualified by affinity and consanguinity. (2) Because the judgment and commitment were uncertain and indefinite and did not limit the time under which he could be confined and that since he is unable to deliver certain of the notes the order amounts to the imprisonment for the term of his natural life. (3) Because the statutes of the State provide that the District Court shall not have the power to imprison any person for a period any longer than three days for a contempt, whereas said judgment undertakes to confine this applicant for a longer period than three days, and as a matter of fact he has already been confined thereunder for thirty-eight days. (4) Because the matters set up in the motion and judgment did not and could not constitute a contempt.

The return of the Sheriff. (Case, 633, p. 21; Case, 632, p. 32) sets out the proceedings above recited annexing the writ of commitment, the order under

which it was issued, the petition in the contempt proceeding, the answer thereto and the order appointing the Receiver. All the proceedings which are above narrated were before the Court upon the return of the Sheriff. Upon the hearing no additional testimony was taken. The controversy was decided upon the petition and the return.

Upon remanding the prisoner the Court delivered an opinion (Case, 633, pp. 63, 73).

Assignment of errors in the State Court proceeding.

The following is the assignment of errors in the State Court relied upon in this Court (Case 633, p. 75, *et seq.*):

I.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was restrained of his liberty and was in custody, in violation of the Constitution of the laws, and of a treaty of the United States, and it appears from said petition or application that the petitioner was entitled to the writ.

II.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that he was deprived of his liberty, and, if he submitted to the order of the trial Court, would be deprived of his property without due process of law, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

III.

The matters and things set out in petitioner's application or petition for a writ of habeas corpus showed that he was denied the equal protection of the laws, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

IV.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was guilty of no contempt of Court in refusing to deliver to the Receiver the property in controversy, and that petitioner was entitled to have his claim to said property tried and adjudicated in a regular suit in Court, with all the rights and privileges incident thereto, before he could be required by any Court to deliver up possession thereof to the Receiver or any other person.

V.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the trial Court had no jurisdiction nor power to determine in a contempt proceeding the right to property adversely claimed and possessed by petitioner against the Receiver, and that such adjudication was *coram non judice* and without due process of law, and that the order of the Court imprisoning petitioner for his failure to obey that pretended adjudication was in violation of petitioner's rights under the Constitution of the United States and under the laws thereof and under the treaty between the United States and Great Britain.

VI.

The petitioner was an alien and a citizen of Great Britain, and was, therefore, entitled, in the proceedings instituted against him to get possession of the property in controversy, to have the controversy removed into the Federal Court under the laws of the United States relating to such matters, and petitioner could not be deprived of this right and of the possession of the property by an order of the Court to deliver up possession to the Receiver under the guise of a contempt proceeding.

VII.

The matters and things set out in petitioner's applica-

tion or petition for writ of habeas corpus showed that petitioner by virtue of the treaty between the United States and Great Britain, was entitled to the same protection, under the Federal Constitution and law, as a citizen of the United States, and that petitioner should not be deprived of his property or imprisoned except by due process of law and according to the law of the land.

VIII.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the order of imprisonment as to the $492.52 trust money was in effect an order for imprisonment for debt, contrary to the rights guaranteed to the petitioner under the constitution of Texas.

IX.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the order of Court imprisoning petitioner for contempt was, in effect, an order for perpetual imprisonment, and undertook to confine him for a longer time than is allowed under the statutes of Texas providing for punishment for contempt, and that in this respect the order deprived petitioner of the rights guaranteed to him under said treaty, the Federal Constitution, and the laws and constitution of the State of Texas.

X.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the order holding petitioner in contempt of Court and requiring him to deliver possession of the property in controversy was void, and that the Court had no power nor jurisdiction to pass such an order in the proceedings before the Court, and further that the Court had no jurisdiction over the subject-matter in controversy.

XI.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was not, in fact, guilty of contempt of Court, and that he held no property as an officer of the cemetery company or to which the company was entitled, and it was therefore impossible for him to comply with the Court's order.

In May, 1897, a writ of habeas corpus was granted by Judge Bryant in the United States Circuit Court at Galveston, upon a petition of Tinsley, setting out somewhat more fully and in detail the proceedings as stated in the petition in the State Court (Case 632, p. 1, *et seq.*) An amended petition was filed on the 7th of June, 1897 (p. 12).

In this petition it is stated with regard to the so-called trust fund of $492.50 that this sum had been misappropriated by Wisby, and that the petitioner had assumed the liability and had invested it in vendors' liens notes as required by the charter of the company, and that in order to make the investment he had put in the additional sum of $7.70 of his own money, and that he tendered the notes to the Receiver upon payment of this sum, but that the Receiver declined to make this small payment and refused to accept the notes as an investment of the fund, but demanded the cash (Case, 632, p. 14).

To this application the Sheriff filed a return which was simply an exception to the sufficiency of the facts stated in the petition and which accordingly conceded all the facts therein stated (p. 32). A hearing was had before the United States Circuit Court for the Eastern District of Texas and the petition was dismissed and the prisoner remanded (p. 33).

Assignment of errors in the United States Circuit Court proceeding.

The following is the assignment of errors in the United

States Circuit Court relied upon in this Court (case 632, p. 34, *et seq*).

I.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was restrained of his liberty and was in custody in violation of the Constitution, of the laws, and of a treaty of the United States, and it appears from said petition or application that the petitioner was entitled to the writ.

II.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that he was deprived of his liberty and, if he submitted to the order of the trial Court, would be deprived of his property without due process of law, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

III.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that he was denied the equal protection of the laws, in violation of the Constitution of the United States and the fifth and fourteenth amendments thereto.

IV.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was guilty of no contempt of Court in refusing to deliver to the Receiver the property in controversy, and that petitioner was entitled to have his claim to said property tried and adjudicated in a regular suit in Court, with all the rights and privileges incident thereto, before he could be required by any Court to deliver up possession thereof to the Receiver of any other person.

V.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the trial Court had no jurisdiction or power to determine in a contempt proceeding the right to property, adversely claimed and possessed by petitioner against the Receiver, and that such adjudication was *coram non judice* and without due process of law, and that the order of the Court imprisoning petitioner for his failure to obey that pretended adjudication was in violation of petitioner's rights under the Constitution of the United States and under the laws thereof, and under the treaty between the United States and Great Britain.

VI.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that the petitioner was an alien and a citizen of Great Britain, and was, therefore, entitled in the proceedings instituted against him to get possession of the property in controversy to have the controversy removed into the Federal Court under the laws of the United States relating to such matters, and that petitioner could not be deprived of this right and of the possession of the property by an order of the Court to deliver up possession to the Receiver under the guise of a contempt proceeding.

VII.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that petitioner, by virtue of the treaty between the United States and Great Britain, was entitled to the same protection under the Federal Constitution and law as a citizen of the United States, and that petitioner should not be deprived of his property or imprisoned except by due process of law and according to the law of the land.

VIII.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order of imprisonment as to the $492.52 trust money was in effect an order for imprisonment for debt, contrary to the rights guaranteed to the petitioner under the constitution of Texas.

IX.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order of Court imprisoning petitioner for contempt was in effect an order for perpetual imprisonment, and undertook to confine him for a longer time than is allowed under the statutes of Texas providing for punishment for contempt, and that in this respect the order deprived petitioner of the rights guaranteed to him under said treaty, the Federal Constitution, and the laws and constitution of the State of Texas.

X.

The matters and things set out in petitioner's application or petition for writ of *habeas corpus* showed that the order holding petitioner in contempt of Court and requiring him to deliver possession of the property in controversy was void, and that the Court had no power nor jurisdiction to pass such an order in the proceedings before the Court, and further that the Court had no jurisdiction over the subject matter in controversy.

XI.

The matters and things set out in petitioner's application or petition for writ of habeas corpus showed that petitioner was not in fact guilty of any contempt of Court, and that he held no property as an officer of the Cemetery Company, or to which the company was entitled, and it was therefore impossible for him to comply with the Court's order.

POINTS.

I.

The commitment and the order on which it was made were void.

I.—Distinct and imcompatible proceedings were blended in one judgment. The proceeding to punish Tinsley for a contempt in having disobeyed the order was in the nature of a criminal proceeding under the Texas statute instituted really on behalf of the people ending in a fine to be paid to the Sheriff and to be collected for the use of the county. The proceeding adjudging that Tinsley deliver certain specified property to the Receiver, and that he stand committed until delivery, was a civil remedy instituted by the Receiver ending in a direction that the property be delivered to the Receiver, and in a commitment by way of execution to enforce the judgment. The former was a conviction and sentence. The latter a judgment and execution. They differ as to parties, subject matter and adjudication. To blend them in one pleading, one trial and one judgment was to disregard distinctions vital to the due administration of law. The distinction between these remedies is intrinsic and evident.

In re Chiles, 22 Wall., 157.
People *vs.* Court of Oyer & Term., 101 N. Y., 245.
Thompson *vs.* R. R. Co., 487 Equity, 105.
Rapalje on Contempt, Sec. 21.

It is recognized in the opinion in the Court below (Case 633, p. 72), and requires no further comment for its elucidation.

Because these remedies are essentially different they cannot be blended in one. "Civil and criminal proceed-
" ings can never thus be united and blended at least
" without the sanction of some positive statute. Hence
" the final order in contempt proceedings must be one
" thing or the other; it must impose criminal punishment

" for the misconduct or enforce the civil remedy by award-
" ing indemnity. It cannot do both."

Matter of Pierce, 44 Wisc., 411–422.

II.—If, however, we regard each of these proceedings as separately before the Court and examine each of them as a separate proceeding regarding so much of the judgment as is applicable to one as having been made in that proceeding, and so much of the judgment as is applicable to the other as having been made in it, we shall find that each of the proceedings standing independently is void.

III.—Regarding the order as made in the proceeding as a civil remedy directing the appellant to deliver the property specified to the Receiver, or in default of delivery that he be committed until he make delivery, it was void for the reason that the Court had no authority in a proceeding to punish for contempt to determine the right of possession of property claimed adversely to the Receiver or give judgment for the payment of a debt.

(1.) The order appointing the Receiver of the property of the Houston Cemetery Company did not specify particular property. It extended generally to property held or possessed by the company. The officers of the company were required to deliver to the Receiver the property under their control "to which such corporation is entitled or " which they hold or control as such officers, directors, " agents or employees." The order did not extend to the property held or possessed by appellant, nor did it attempt to take this or any other particular property which was the subject of controversy into the possession of the Receiver to abide the result of any controversy respecting it made by appellant or against him. The object of the litigation was the preservation of the property of the company, not the ascertainment of any controverted rights touching the property claimed by appellant. Hence although appellant was a party to the action his presence gave the Court no jurisdiction over property in his posses-

sion and claimed by him. He was in the situation of a stranger having in his possession property which the corporation claimed, and which he also claimed. A proceeding to punish him for contempt was not a lawful judicial process by which to determine his right of possession or title to such property. The Court was, therefore, without jurisdiction to render a judgment determining such right of possession or title.

This has been repeatedly and uniformly held.

Ex Parte Hollis, 59 Cal., 405.
Parker *vs.* Browning, 8 Paige, 388.
Havemeyer *vs.* Superior Court, 84 Cal., 385.
Davis *vs.* Graves, 16 Wall., 218.
Baldwin *vs.* Wayne Co. Circuit Judge, 101 Mich., 119.
State *vs.* Ball, 5 Wash., 387.
Matter of Muehfeld, 16 App. Div. (N. Y.), 401.
Ex Parte Grace, 79 Am. Dec., 534, 539.
State *vs.* Start, 74 Am. Dec., 278.
Ex Parte Hardee, 68 Ala., 303.
Beach on Receivers, §§ 216, 247.
High on Receivers, § 149.

In Ex Parte Hollis, *supra*, the principle is clearly and forcibly stated as follows :

"The question, therefore arises whether a superior "Court has authority to adjudge a party guilty of con- "tempt and to fine and imprison him for not turning "over to a Receiver in insolvency moneys and effects, "part of which he claims adversely to the insolvent "debtor ; and the other part is also claimed adversely "by a corporation with which he is not connected as an "executive officer or director. We think such a power "cannot be exercised over a party, unless he has col- "lected and holds the money and effects as Trustee for "the estate of the insolvent debtor, and the Court has "jurisdiction over him as an officer of the Court, or as "a party to the proceedings. It is not claimed that the "Real Estate and Building Association was an officer of "the Court, or a party to the proceedings in insolvency, "nor was the petitioner. Verifying the answer of the "insolvent debtor did not make him a party. Process

"against the corporation brought the corporation alone "into Court; being in Court it verified and filed its "pleadings according to law. It was the only party to "the record. Neither the president, secretary, the indi-"vidual directors, nor stockholders were parties to the "proceedings. The petitioner then was not an officer of "the Court nor a party to the proceedings in insolvency. "He claimed the property under title adverse to all the "world. As an adverse claimant he was not before the "Court. The Court had no control or jurisdiction over "him or over his property. 'And it could not, "by a mere order to show cause why he should "not be punished for contempt of Court make "him, as an adverse claimant, a party to the proceedings "and adjudge his right to the property in a summary "way. * * * If his title is claimed to be invalid as "fraudulent and void, he is entitled to be heard accord-"ing to the forms of law. Proceedings to punish him for "contempt for not delivering it up, without a trial accord-"ing to law, to another who claims it, are not the appro-"priate proceedings for the trial of issue of title' " (See page 413, *et seq.*).

And in Parker *vs.* Browning, 8 Paige, 338, 391, Chancellor WALWORTH stated the rule as follows:

"If the property is in the possession of a third person "who claims the right to retain it, the Receiver must "either proceed by suit in the ordinary way to try his "right to it, or the complainant should make such third "person a party to the suit and apply to have the Re-"ceivership extended to the property in his hands; so "that an order for the delivery of the property may be "made which will be binding upon him and which may "be enforced by process of contempt if it is not obeyed."

The same principle is stated in almost identical language in State against Ball, 5 Wash., 387.

The precise question was passed upon in the matter of Muehlfeld, 16 App. Div. (N. Y.), 401. In a proceeding for the voluntary dissolution of a corporation a Receiver was appointed. The corporation had made a general assignment for the benefit of creditors and the assignee was in possession of certain property. The Receiver applied for an order directing the assignee to deliver the property to him and the order was made. From that order an ap-

peal was taken and the order was reversed. The Court said:

"The proceeding was, therefore, one not simply to de-
"termine the right of possession of the property, the title
"to which was not disputed, but to decide as to the
"ultimate right of the property of the company between
"two persons each of whom presented a paper title.
"The serious question, therefore, was the question of
"property. The Receiver sought in this summary way to
"take away from the assignee the property of which he
"claimed to be the owner. We do not think it can be
"done in this way."

The authorities are summarized in Beach on Receivers (§ 258) as follows:

"It is also clearly well settled that in a proceed-
"ing to punish for contempt of court, the question
"of the title to property cannot rise or be adjudicated.
* * * It, (the Court) will not directly or indirectly assume
"to consider or decide to whom the property belongs or to
"decide that the Receiver has or has not the right of pos-
"session in and to it."

The process for contempt to enforce the summary delivery of property in such case serves a purpose similar to that of a writ of assistance or sequestration and such a writ will not be issued to take property from the possession of a stranger claiming title at the instance of a Receiver.

Thus Mr. High says (Receivers, Sec. 149): "While a
"court of equity will in a proper case freely extend its aid
"by a writ of assistance to enable its Receiver to obtain
"possession of property to which he is entitled, it will not
"thus interfere upon a mere motion as against the possession
"of a stranger to the action claiming a superior title under
"which he holds possession, but will leave the disputed
"question of title to be determined by an action for that
"purpose." Citing Gelpke *vs.* M. & H. R. Co., 11 Wisc. 454, where DIXON, C. J., said: "I know of no case where
"it has been adjudged that the possession of a stranger
"who sets up a superior title in pursuance of which he
"claimed to have entered and to hold might be thus dis-
"turbed. In such cases it has been the uniform rule to
"leave the plaintiffs to their remedies by action."

An illustration of the application of this principle is found in the administration of the former bankrupt law.

In re Marter, 12 N. B. R., 185, it appeared that Marter was adjudged bankrupt and an injunction was issued restraining him and one Bechtel from disposing of the property of the bankrupt. Marter had previous to the adjudication made a general assignment to Bechtel. Bechtel proceeded to make sale of the goods so assigned, and upon a proceeding to punish him for contempt it was held that since the injunction restrained only a sale of property belonging to the bankrupt, it was not in the power of the Court to proceed in a summary manner upon proceedings for contempt to determine the ownership of the property. This rule was based upon the decisions in this Court in Smith *vs.* Mason, 14 Wall, 419, and Marshall *vs.* Knox, 16 Wall., 551. The latter case is instructive also upon the claim made in the opinion in the Court below (p. 61) that, since the plaintiff in error claimed a lien only, he would be deprived of no property right, should he be compelled to deliver possession to the Receiver. In response to a similar argument, Mr. Justice BRADLEY, speaking for the Court, said (16 Wall, 557): "The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing as much as the subject of litigation as the thing itself." (In this connection see also Ham *vs.* Live Stock Co. 35 S. W. R., 427.)

Another application of the same principle is found in the administration of the statutes which exist in many States regarding proceedings supplementary to execution. Under these statutes the Courts have power to appoint a Receiver of the property of a judgment debtor. The uniform rule is that where a Receiver has thus been appointed he cannot compel the delivery of property in the possession of third persons, who claim title or right to possession adverse to the judgment debtor by proceedings for contempt.

Rodman *vs.* Henry, 17 N. Y., 482.

Barnard *vs.* Kobbe, 54 N. Y., 516.
West Side Bank *vs.* Pugsley, 47 N. Y., 368.
Krone *vs.* Klotz, 3 App. Div., 587.
In re Havlick, 45 Neb., 747.
Edgerton *vs.* Hanna, 11 Ohio State, 323.

(2.) The principle for which we contend seems to have been conceded in the opinion in the Court below, but its application was denied for the reason that it was claimed that Mr. Tinsley was a party to the action in which the Receiver was appointed and the case of Tolman *vs.* Jones, 114 Ill., 148, was relied upon as authority that in such a case a party could not refuse delivery to the Receiver upon the claim of his own right of possession. That case, however, is clearly distinguishable upon its facts. There certain of the defendants were directors and officers of a corporation in which the plaintiffs were stockholders. They were also members of a limited partnership, of which the plaintiffs were the special partners. The bill alleged that these defendants conspiring with Tolman also a defendant to cheat the plaintiffs had made a fictitious note in favor of Tolman signed by themselves individually in the firm name under which execution had been levied upon property of the corporation, and that they had made a fraudulent bill of sale to Tolman of property which rightfully belonged to the corporation, but which they had wrongfully converted to their own use. A Receiver was appointed and an order was made requiring Tolman to deliver to the Receiver the property transferred to him and received by him under said bill of sale and all the property of defendants which had been delivered to him under said bill of sale or otherwise. The Master required him to execute a formal assignment to that effect. This he declined to do. The contention on the proceedings to punish for contempt was that the order was too broad. The subject matter of the suit in that case included the property transferred by the bill of sale. It was that property in the hands of the defendant Tolman, which the Court directed the Receiver to take. The Receivership by its terms therefore extended to Tolman and to the property claimed by him, but here the order does not sequestrate the property of Tinsley, or

property alleged to have been delivered to him or in his possession, nor is that property the subject of the controversy. The Receivership extends only to property belonging to and in possession of the corporation.

The mere presence of a party does not give the Court jurisdiction of his person or of his property, except as to the matter or thing which is the subject of the action. The validity of the pledge to Tinsley and his right to the possession thereunder were not the subject of the action in which the Receiver was appointed. They could not have been since the pledge was not made until after that action was commenced. He was made a party defendant in an action the subject matter of which related to the maintenance of the cemetery, the construction of a certain bridge and the maintenance and improvement of the grounds, drives and walks of the cemetery, and generally to carry on the business of the company (Case, 632, p. 13). So far as any other subject was concerned, Tinsley was present merely as a stranger. He was neither a necessary nor a proper party, except as he was an officer of the company and its agent. Havemeyer *vs.* Superior Ct., 84 Cal., 385. We may test the question as to whether he was a party in the sense now claimed by inquiring whether the litigation instituted by Drew rendered Tinsley's presence necessary or proper to the rendition of a judgment. Plainly it did not. We may test the question further by supposing that all persons who were creditors of the corporation, or who held any of its property in pledge or otherwise under adverse claims, had been made parties, and by inquiring whether the judgment in the action could have determined their rights against the company, and whether they could have been compelled by summary process to pay over claims to a Receiver appointed *pendente lite*, or to turn over to such Receiver property so held by them to await the determination of the action. This inquiry answers itself. It would be utterly inadmissible under the administration of law as known to us to hold that the mere appointment of a Receiver of the property of a corporation confers upon a Receiver the right to a determination of all conflicting claims in the firm assets by summary proceedings and the enforcement

of the determination by commitment for contempt. This is so for the manifest reason that such adverse claims are not the subject of the action in which the Receiver is appointed, and even though the claimants were made parties, they are not proper parties to the actual controversy, and cannot be converted into parties to a controversy not set up. The Court, therefore, was without jurisdiction respecting their claims.

Jurisdiction means something more than that a party has been brought before the Court, or that the Court has a general jurisdiction of the subject matter—it requires that the particular subject matter shall have been brought into issue in the particular action before the Court.

In Windsor *vs.* McVeigh, 93 U. S., 274, this Court, by Mr. Justice FIELD, stated the doctrine as follows:

"Though the Court may possess jurisdiction of a cause "of the subject matter and of the parties it is still limited "in its modes of procedure and in the extent and charac- "ter of its judgment. It must act judicially in all things "and cannot then transcend the power conferred by the "law. If, for instance, the action be upon a money de- "mand, the Court, notwithstanding its complete jurisdic- "tion over the subject and parties, has no power to pass "judgment of imprisonment in the penitentiary upon the "defendant. If the action be for libel or personal tort, "the Court cannot order in such a case a specific perform- "ance of a contract. If the action be for the possession "of real property the Court is powerless to admit in the "action the probate of a will."

Frequent illustrations of the application of this principle are to be found. The cases are familiar and need no extended discussion.

Reynolds *vs.* Stockton, 140 U. S., 254.
Bigelow *vs.* Forrest, 9 Wallace, 339.
Seamster *vs.* Blackstock, 83 Va., 232.
Risley *vs.* Phœnix Bank, 83 N. Y., 318.
Shaw *vs.* Broadbent, 129 N. Y., 114.
Stanwood *vs.* Hubbell, 23 N. Y., 520.
Allen *vs.* Farmers' Loan & Trust Co., 18 App. Div., 27.
Black on Judgments, 242.

We may therefore conclude that Tinsley was not a party to the action in any such sense as gave the Court jurisdiction to pass upon the validity of the pledge to him or of his right to possession thereunder. Hence he is to be treated in this regard as though he were not a party at all but were a mere stranger, and the authorities cited above in paragraph (1) of this subdivision apply.

(3.) Nor can it be successfully contended that the institution of the action before the making of the pledge by the corporation alters the situation. The commencement of the action did not suspend the powers of the corporation or of its officers. It might still proceed with its business and raise money for its legitimate purposes, and the raising of money for its current expenses, to bury the dead, to prosecute suits, to protect and defend itself against pending litigation (Case 632, p. 3) was within the power of the corporation and its officers. Nor does it appear that a pledge of the corporate property duly authorized by the directors and stockholders to secure such loan would be invalid. At any rate these acts would not be void, and if voidable they could be avoided by the corporation or its Receiver only by legal proceedings lawfully brought for that purpose. The title of the Receiver related only to the date of his appointment. He took the property as of that date subject to such rights of action as the corporation had, or as he was clothed with by statute.

Matter of Schuyler S. S. Co., 136 N. Y., 169.
Conn. River B. Co. *vs.* Rockbridge Co., 73 Fed. Rep., 709.
Storm *vs.* Waddell, 2 San. Chan., 494.
Matter of Muehlfeld, 12 Ap. Div. N. Y., 492.
Same case, 16 App. Div. N. Y., 401.
Beach on Receivers, § 217.

(4.) The jurisdiction to make the order cannot be sustained upon the ground that the proceeding was in effect an independent action brought by the Receiver to try the title or right of possession The answer to this contention is (1st) that this is not an independent action, but an application practically for execution in aid of the enforce-

ment of an order made in an action. It is not possible to convert a proceeding for execution into a proceeding to determine the right to a judgment anterior to the execution for the manifest reason, as we have already shown, that the subject-matter of the one application is not such as to afford the Court jurisdiction to determine the other matter; but (2d), if the direct object of the summary proceeding was to determine Tinsley's property rights or his right of possession, the Court would have no jurisdiction to determine that action without the ordinary procedure of a trial as established by the Courts of Texas.

It goes without saying that there was no reason why the Receiver should not have resorted to an action of replevin to recover the notes and the minute book if he had the legal title, or to an action in equity to recover these articles, and the so-called trust fund, if it were necessary to set aside an illegal transfer. The Courts of Texas afford adequate remedies according to the course of the common law and of equity, as modified by statutes. The law of Texas recognizes no right to trial of title or right of possession by summary proceedings on an order to show cause, and to a judgment enforceable by an immediate commitment to compel the delivery of the property.

A course of procedure in a civil action in substance at least following that which is required by the course and practice of the courts must be regarded as a substantial element of jurisdiction and a complete departure from the prescribed formalities, even though the parties were actually present in court would divest the court of jurisdiction to render any judgment. This has been many times held by this court.

Ex Parte Lange, 18 Wallace, 163.
Ex Parte Bain, 121 U. S., 1.
Hopt *vs.* Utah, 110 U. S. 574.
Edrington *vs.* Pridham, 65 Tex., 617.

In the case last cited the Court said:

"It is plain that such court has jurisdiction to render "a particular judgment only * * * when in its mode "of procedure to the determination of the question of his

"guilt or innocence * * * the court keeps within the "limitations prescribed by law customary or statutory. "When the court goes out of these limitations its action "to the extent of such excess is void. Proceeding within "these limitations its action may be erroneous but not "void."

Mr. Cooley in his work on Constitutional Limitations (p. 257), speaks on this subject as follows:

Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs (Cooley on Cons. Lim., p. 357).

In Windsor *vs.* McVeigh, 93 U. S., 277, 282, Mr. Justice FIELD says:

"So also a departure from established modes "of procedure will often render the judgment void; "thus the sentence of a person charged with felony upon "conviction by the Court without the intervention of a "jury would be invalid for any purpose. The decree of a "Court of equity upon oral allegations without written "pleadings would be an idle act of no force beyond that "of an advisory proceeding of the Chancellor. And the "reason is that Courts are not authorized to exert their "powers in that way. The doctrine stated by counsel is "only correct where the Court proceeds after acquiring "jurisdiction of the cause according to the established "modes governing the class to which the case belongs and "does not transcend in the extent or character of its judg-"ment the law which is applicable to it."

This is forcibly illustrated in Edrington *vs.* Pridham, 65 Tex., 617, where the Court attempted in a proceeding to punish for contempt to enter a judgment for a sum of money and award execution. The judgment was reversed. The Court said: "Valuable rights in the practice and mode of procedure may depend upon the nature of the proceding. These rights are lost if the case is treated by the Court and the parties in its progress and trial as one kind of suit, and in the final judgment it is treated by the Court as another sort of suit."

In Hovey *vs.* Elliott, 167 U. S. 409, 417, Mr. Justice White speaking for the court quotes with approval the language of Story on the Constitution, Vol. 2, Sec. 1789, commenting upon the clause in the 5th amendment where it is declared that no person shall be deprived of life, liberty or property without due process of law, in which he affirms:

"That this clause in effect affirms the right of trial "according to the process and proceedings of the common "law."

And in Lowe *vs.* State of Kansas, 163 U. S., 81, where the question was whether the statute of that State as applied by the Supreme Court controvened the 14th amendment, the Court announced as a test for such case the following:

"Whether the mode of proceeding prescribed by this "statute and followed in this case was due process of law "depends upon the question whether it was in substantial "accord with the law and usage of England before the "Declaration of Independence, and in this country since it "became a nation in similar cases."

In C. B. & Q. R. Co. *vs.* Chicago, *supra*, Mr. Cooley is quoted as follows:

"Due process of law in each particular case means such "an exertion of the powers of government as the settled "maxims of law permit and sanction, and under such safe-"guards for the protection of individual rights as these "maxims prescribe for the class of cases to which the one "in question belongs."

The case at bar is a controversy between adverse parties over the right to control and hold possession of certain property. To settle such a question at a summary contempt hearing is contrary to the settled maxims of law and deprives the party in possession of the requisite safeguards. In the same case Story is quoted as follows:

"Due process of law requires, first, the legislative act "authorizing the appropriation, pointing out how it may "be made * * * and secondly, that the parties or "officers * * * shall keep within the authority con-"ferred and observe every regulation which the act makes

"for the protection or in the interest of the property "owner."

While that language is used regarding the appropriation of property for public use, it on principle applied with greater force to the taking of property from one person without compensation and giving it to another person, as in the case at bar. Is it not as essential to the protection of the property owner in a suit between individuals, or between a Receiver and such property owner, or a person in possession of property that the Court should keep within the authority conferred and regulations imposed by the Legislature as that the "parties and officers," referred to by Mr. Story, should do so? In the same case, the Court observes that a judicial proceeding, which was under consideration in that case, might be as arbitrary and inconsistent with due process of law as a legislative enactment, and as to the latter, says:

"In Davidson *vs.* New Orleans, 96 W. S., 97. it was "claimed that a statute declaring in terms, without more, "that the full and exclusive title to a described piece of "land belonging to one person should be and is hereby "vested in another person, would, if effectual, deprive the "former of his property without due process of law, "within the meaning of the 14th amendment. Such "an enactment would not receive judicial sanction in any "country having a written constitution distributing the "powers of government among three co-ordinate depart- "ments, and committing to the judiciary expressly or by "implication, authority to enforce the provisions of such "Constitution. It would be treated, not as an exertion of "legislative power, but as a sentence—an act of spolia- "tion. * * * "

In Citizen's Sav. & L. Asso. *vs.* Topeka, 87 U. S., 20 Wall., 655, 663 (22, 455, 461), Mr. Justice MILLER, delivering the judgment of this Court, after observing that there were private rights in every free government beyond the control of the State, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was after all but a despotism, said:

"The theory of our Governments, State and National, "is opposed to the deposit of unlimited power anywhere. "The executive, the legislative and the judicial branches "of these governments are all of limited and defined "powers. There are limitations on such power which "grow out of the essential nature of all free govern- "ments."

The possession of property by one person cannot be encroached upon by an arbitrary order of the judicial department made wholly in defiance of the modes for reaching judgment authorizing dispossession prescribed by the legislative department, without violating the fundamental principle which requires co-ordinate departments to refrain from interference with the independence of the other; and the position that an inferior Court can take property from one individual and bestow it upon another, without his permission and without following the modes prescribed by law, either common, statutory or constitutional, and without the right in any appellate Court to review its arbitrary action because it is doue under the guise of a contempt proceeding, which invests it with unlimited power to maintain its dignity and enforce its decree, is utterly inadmissible in any community assuming to be governed by law. Such jurisdiction is not conferred with the summary power to commit and punish for contempt as a part of the law of the land within the meaning of the Constitution.

The exercise of such power is further contrary to the statutes and Constitution of Texas, the paramount guides in ascertaining Tinsley's rights.

"The 14th Amendment, 'as was said in Mo. *vs.* Lewis, "101 U. S., 31,' does not profess to secure to all persons in "the United Stat s the benefit of the laws and the same "remedies. Great diversities in these respects may exist "in two States separated only by an imaginary line. On "one side of this line there may be a right of trial by "jury, and on the other side no such right. Each State "prescribes its own modes of judicial proceeding."

And again in Walker *vs.* Sauvient, 92 U. S., 90, this Court, discussing whether the right of trial by jury in State Courts was secured by that amendment, said:

"This requirement (due process of law) of the consti-
"tution is met if the trial is had according to the settled
"course of judicial proceedings. Due process of law is
"process according to the law of the land. This process
"in the States is regulated by the law of the State."

While, as held in McKane *vs.* Durston, 153 U. S., 687, "an appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal," nor were the further rights of trial by jury, of being sued in the county of one's residence, and of removing a case into the Federal Court, secured in all cases of common law, they are we maintain necessary elements of "due process of law" in Texas, because its constitutional and statutory law makes them essential in all proceedings involving the deprivation of liberty or property. It should not be necessary to argue that these are substantial rights, safeguards erected for the protection of the citizen against the arbitrary power of inferior Courts—especially the right of jury trial and appeal. The Constitution gives the right of jury trial in all civil cases, and the right of appeal in all such cases originating in the District Court (Art. 1, Sec. 15, and Art. 5, Sec. 6).

The United States Court of Appeals in Coles *vs.* Northrup, 66 Fed., 831, recognizes this as a general rule. The Receiver in that case sought an order requiring Cole to deliver possession of certain real estate which was granted by the trial Court. The Appellate Court said:

"The appellant contends that on the issue whether he
"held the property in question as owner in his own right,
"or as a tenant of the Receiver, he was entitled to a trial
"by jury, and we think he was. * * * The cause is
"remanded, with instructions to dismiss the petition of
"the Receiver, but without prejudice to his right, under
"the direction of the Court, to institute proper proceed-
"ings at law to recover the property in controversy."

This has been held in Texas, by the provisions of the Constitution, to apply to all issues involving property rights in Ham *vs.* Live Stock Co., 35 S. W., 427. The ruling of this Court in Wong Wing *vs.* U. S., 163 U. S., 228, that because of the language of the 5th and 6th Amendments,

the persons of Chinese could not be subjected to infamous punishment at hard labor, or their property confiscated, without a jury trial, in principle supports the construction of the Texas Constitution by the Texas Court. It is true that construction does not destroy the Court's power to decide for itself questions of contempt without interference by jury trial of appeal, but it does effectually limit that power within its proper bounds; it prevents the exercise of such power so as to dispose by that means of property rights.

The Texas statute further specifically provides for imprisonment as a means to enforce delivery of specific property sued for, after a judgment has been obtained in a regular suit (Rev. St., Art 1339). We think this excludes any other process for attaining that end. Again the statutes provide elaborately and in detail means for getting possession of property upon filing suit and means for preventing the party in possession from transferring the property pending litigation. There is a special chapter on the "Trial of the Right of Property" where the plaintiff can get immediate possession upon giving bond and the defendant can replevy. Shall all this be abrogated to foster the one process of contempt? To seize property not in the possession of the company or Receiver by a contempt proceeding and thus dispose of it is against the whole theory of Texas jurisprudence. It is to render useless all the judicial machinery for attaining justice, that the legislature has been years in improving. It is to ignore all the checks and balances the legislature has seen fit to invent as necessary to secure the rights of the party in possession.

IV.—Moreover, the petition in the United States Circuit Court contained the averment that petitioner had not then and never had possession or control since the application for the Receivership was made if certain of the notes mentioned in the judgment. This averment was not controverted and it must be taken as true in this Court.

Kohl *vs.* Lehlback, 160 U. S., 296.
Whitten *vs.* Tomlinson, 160 U. S., 231, 242.

Thus, in effect, the appellant was sentenced to an indefinite imprisonment. An order of that character was beyond the power of the Court to make.

Ex parte Keasby, 34 S. W., 364, 365.
Edrington *vs.* Pridham, 65 Tex., 617.
Ex parte Robinson, 19 Wall., 505.
State *vs.* Kaiser, 8 L. R. A., 584.

V.—As to the so-called trust fund the answer interposed in the contempt proceeding as well as the petitions for habeas corpus show that the contention by Mr. Tinsley was that the fund had been misappropriated by Wisby, and that his (Tinsley's) liability therefor arose from his having assumed the liability, and that there was no such fund in his possession, but that he had made an investment in vendor's lien notes as provided by the charter of the Company which he was prepared to turn over to the Receiver, but which the Receiver refused to accept (Case 632, pp. 14, 26, 28; Case 633, pp. 36, 4).

Thus there was presented as to this fund simply a question as to getting in the assets of the company by the Receiver. Could he collect a debt by summary proceedings and contempt? Concededly no. Could the question whether Tinsley had this money in his possession as specific property of the corporation, or whether he owed it as a debt by reason of his assumption of Wisby's liability, be determined by a summary proceeding, and by contempt? Plainly no, if the argument advanced above is correct.

VI.—The imprisonment under the commitment is illegal for the further reason that the order directing the delivery of the property also directed the issue of the commitment before there had been any refusal upon the part of Tinsley to comply with the directions to deliver the property specified. The order to show cause was two fold. First, why he should not be punished for contempt in disobeying the order of April 13d, and why he should not be committed for such a disobedience "as an aid to the en-
" forcement of the decree until compliance by him there-

" with in the particulars of disobedience by the aforesaid " affidavit."

This was equivalent to an order to show cause why he should not deliver the property specified, and the Court proceeded summarily to try this question and made its decree directing him to deliver a portion of the property. It could not with certainty be known how much of his contention would be sustained and how much disallowed. In point of fact a large part of his contention was sustained. Nevertheless without service of the judgment or notice to the appellant or demand the order directing that a commitment issue forthwith to carry the judgment into effect. The Court anticipated the default and commited the appellant in anticipation of the disobedience. The commitment was therefore void. A man cannot be convicted of an offense in anticipation of its being committed.

In re Chiles, 22 Wall, 157-169.
Brinkley *vs.* Brinkley, 47 N. Y., 40, 46.
Rive *vs.* Ehele, 55 N. Y., 518.
First Nat'l Bank *vs.* Fitzpatrick, 80 Hun, 75.
Fromme *vs.* Jarecky, 77 St, Rep. (N. Y.), 1087.

VII.—Considering the order now as having been made to punish a disobedience of the previous order as a contempt of Court, we submit, apart from the considerations already urged, that the order in this particular is void, for the reason that the Court had no authority to inflict the punishment directed. The order adjudges Tinsley guilty of a contempt of Court in having wilfully disobeyed the order made April 23, 1896, by failing and refusing to turn over to the Receiver the property described, and it is thereupon adjudged that Tinsley " pay to the Sheriff of Harris County, Texas, a fine of $100 as a punishment for the contempt aforesaid * * * and that in default of immediate payment of said fine * * * he be imprisoned in the common jail of Harris County, Texas, until he shall pay the said fine of $100 as herein directed."

The statute of Texas, under which the order was made, reads as follows:

"The District Courts shall also have power to punish by fine not exceeding $100, *and* by imprisonment not exceeding three days, any person guilty of contempt of such Court" (R. S. Texas, Art. 1101, p. 254).

It is respectfully submitted:

First.—That the punishment in this case was illegal and unauthorized, because the prisoner was committed until the fine imposed be paid, without regard to the limitation of three days imposed by the statute; and

Second.—For the reason that if the statute is not to be construed as limiting the duration of imprisonment as a means of collecting the fine, then the order was void because it departed from the statute in imposing a fine merely.

First.—The meaning of the statute plainly is that the Court shall have power to fine and imprison a contemnor, but that the imprisonment shall be limited to a period of three days only, and that the imposition of the fine shall not extend the period of imprisonment. In the opinion of the Court below, it is said (Case, 633, p. 72), "It will be noted that the Court, in exercising its punitive authority, only fined the relator $100. It imposed no imprisonment as a penalty." The opinion proceeds upon the theory that the commitment until the fine is paid was not punishment, but merely a mode of collecting the fine, although it seems to be conceded that if there had been any punishment by imprisonment it could have been only for three days, and in that event, the fine, if not paid, could have been collected otherwise than by commitment.

It may be conceded that at common law a fine imposed either criminally or civilly could be collected by arrest and imprisonment. But a fine imposed in a criminal action can also be collected by action.

6 Ohio St., 604.
Rex *vs.* Woolf, 2 B. & Ald., 609.
Rex *vs.* Carlisle, 1 D. & R., 474.

Generally in this country by statute or under the common law, a fine is treated as a sort of judgment debt.

Bishop's Criminal Proc., Sec. 1304.

The Texas statutes provide a method for the collection of fines by actions to be brought by the Sheriff. While, therefore, the imposition of a fine alone implies authority to collect it by commitment, yet, when the penalty is both fine and imprisonment, that implication is repelled, and the legislative intent, from the language, is that the term of imprisonment prescribed should constitute the only imprisonment under the sentence. By statute a Sheriff who fails or refuses to make a return of process "shall be fined for a contempt" (Rev. Stat., Art. 4917), and it is said that in these cases, as also in cases of defaulting jurors, who are also subject to fine (Rev. Stat., Art. 3186), the proper practice is to enter a judgment *nisi* for the amount of the fine, and *sciri faceas* is issued commanding the person against whom judgment *nisi* is rendered to appear at the next term and show cause why judgment for the fine shall not be made absolute against him (Crow *vs.* The State, 24 Tex., 12). A different view of the statute seems to have been taken in the Appellate Court (*ex parte* Robertson, 27 Tex. App., 628), but there the fine was imposed as indemnity and not as punishment.

Statutes of this character are ordinarily disjunctive "fine or imprisonment," as in the provisions of the U. S. R. S., 725. In that case, the punishment by fine stands as though it were unaccompanied by any other direction. But, in the Texas statute, the language is conjunctive. The fine, therefore, is not to be separated from the imprisonment, and the distraint of liberty and the deprivation of property are combined together, and each is limited. The duration of the imprisonment cannot, therefore, be enlarged by the imposition of the fine. That this is so is apparent, from the fact that it is well settled by the Texas Courts, that where the statute directs the imposition of a fine *and* imprisonment, the imposition of a fine alone is unauthorized, and a sentence to that effect is illegal.

Fowler *vs.* The State, 9 Tex. App., 149.
Sager *vs.* The State, 11 Tex. App., 110.
Johnson *vs.* The State, 18 Tex. App., 7.

It seems therefore to be clear that if this statute is before the Court for construction, its plain meaning is that the contemnor must be fined and imprisoned and that the imprisonment cannot exceed three days. In the case at bar, the prisoner had been in confinement for more than thirty days when the writ of habeas corpus was granted.

But it may be said that this Court is not at liberty to construe the statute, and is bound by the construction placed upon it by the Texas courts. While it is freely conceded that the rule in this Court is that it will follow the construction placed upon State statutes by the highest Court of the State, yet where the construction placed upon the statute by the State Courts is not uniform, and especially where there is no construction of the particular statute by the highest Court of the State, this Court may properly construe the statute according to its own understanding of the true intent.

Bell *vs.* Morrison, 1 Pet., 351.
Burgess *vs.* Seligman, 107 U. S., 20-34.

So far as we have been able to ascertain there has been no construction of this statute by the Supreme Court of Texas, and none by the Appelate Court except as above stated.

Second.—The order was void if it imposed merely a fine.

The Court was without discretion in the matter of imposing both a fine and imprisonment. The amount of the fine up to $100 was within its discretion and the period of imprisonment up to three days was within its discretion, but it had no discretion to imprison without fine or to fine without imprisonment. It was bound to apply the statute according to its precise language, and a departure from the statute rendered its action void.

Ex parte Bennett, 7 Pac., C. L. J.
Gurney *vs.* Tofts, 37 Mo., 130.
U. S. *vs.* Vickery, 1 Har. & Joh., 427.
State *vs.* Mooney, 27 West Va., 546.
Bishop on Criminal Law, Sec. 941.
Black on Judgments, Sec. 258.

Fowler *vs.* The State, 9 Tex. App., 149.
Sager *vs.* The State, 11 Tex. App., 110.
Johnson *vs.* The State, 18 Tex. App., 7.
Bigelow *vs.* Forrest, 9 Wall, 339.
Ex parte Lange, 18 Wall. 163.
In re Bonner 157 U. S. 242.
In re Mills 135 U. S. 263, 270.

The complaint of the ~~contemnor~~ appellant, of course, is not that he has not been punished by imprisonment as well as fine, in the sense that additional punishment should have been imposed, but in the sense that the punishment should have been properly apportioned between the fine and imprisonment. If a fine of $100 was the measure of his offense, then something less than the fine should have been imposed upon him together with an imprisonment for some period. In deciding as to the legality of the punishment, the ability of this particular prisoner to pay or not to pay is wholly immaterial. The statute is to be construed in the light of its general application. It was the possibility of abuse of arbitrary power which was aimed at by the statute. It was to prevent a Judge from imposing an undue penalty for what he might regard as a contempt of the dignity of the Court. For this reason the amount of the fine and the term of the imprisonment were limited. It was because a person incapable of paying the fine might be imprisoned for an indefinite period that the limitation was put upon the power of imprisonment.

The sentence imposed being without authority of law, it was void, and the prisoner was entitled to be discharged on habeas corpus.

In re Bonner 157 U. S. 242.
In re Mills 135 U. S. 263, 270.
People *vs.* Carter, 48 Hun. (N. Y.) 166.
People *vs.* Liscomb, 60 N. Y. 559.
Commonwealth *vs.* Newton, 1 Grant (Pa.) 453.
Ex parte Lange, 18 Wall.
Ex parte Degener, 30 Tex. App., 566.

II.

The order and commitment being void, the appellant was deprived of his liberty by the State without due process of law and was entitled to his discharge on habeas corpus.

(1.) The 14th amendment extends to the judicial functions of a State. A Judge exercising such functions under the authority of the State is the State within the meaning of the Constitution. It is no reply to say that the powers conferred upon the Court or Judge are such as are not repugnant to constitutional restrictions. The exercise of judicial powers which are in excess of the legitimate powers conferred by law, whereby a person is deprived of life, liberty or property is a violation of the due process guaranteed by the Constitution.

The law upon this subject is stated by this Court through Mr. Justice HARLAN in Chicago, B. & Q. R. R. Co. *vs.* Chicago, 166 U. S., 226-233, in these words:

"It must be observed that the prohibitions of the "amendment (14th) refer to all the instrumentalities of "the State, to its legislative, executive and judicial "authorities, and therefore whoever by virtue of public "position under a State government deprives another of "any right protected by that amendment against depriva- "tion by the State 'violates the constitutional inhibi- "'tion; and as he acts in the name and for the State and "'is clothed with the State's power his act is that of the "'State.' 'This must be so or as we have often said the "constitutional prohibition has no meaning and 'the "'State has clothed one of its agents with power to annul "'or evade it.'"

Again, in the same case (p. 234), the Court says:

"But a State may not, by any of its agencies, disregard "the prohibitions of the 14th amendment. Its judicial "authorities may keep within the letter of the statute "prescribing forms of procedure in the Courts, and giving "the parties interested the fullest opportunity to be

"heard, and yet it might be that its final action would be "inconsistent with that amendment. In determining "what is due process of law, regard must be had to sub- "stance not to form. This Court, referring to the 14th "amendment, has said: 'Can a State make anything due "process of law which by its own legislation it chooses to "declare such? To affirm this is to hold that the prohibi- "tion to the States is of no avail or has no application "where the invasion of private rights is affected under "the forms of State legislation' (Davidson *vs.* New "Orleans, 96 U. S., 97). The same question could be pro- "pounded and the same answer should be made in refer- "ence to judicial proceedings inconsistent with the require- "ments of due process of law."

This statement of the law is supported by the decisions of this Court.

Ex parte Virginia, 100 U. S., 339, 346, 347.
Neil *vs.* Delaware, 103 U. S., 370.
Yick Wo *vs.* Hopkins, 118 U. S., 356.
Gibson *vs.* Mississippi, 162 U. S., 565.
Scott *vs.* McNeal, 154 U. S., 34.

(2.) The test whether a judicial proceeding violates the "due process" secured by the Constitution is to be found in its jurisdiction to do the act complained of. It is not claimed that every error in the course of a judicial proceeding by which a party is deprived of what he may regard as or what he may ultimately show to be a just administration of the law is such a departure from due process as will amount to an infringement of the protection afforded by the constitutional limitation.

But where a Court or Judge undertakes to deprive a person of life, liberty or property without having jurisdiction to do so, the act is unauthorized and void.

If the constitutional limitation regarding due process has application to judicial proceedings, then such proceedings at least as are absolutely void having the effect of judicial authority' but really arbitrary and not judicial in character, are within its restrictions. As to this proposition, if there ever was any doubt it cannot be said that it any longer exists.

Hovey *vs.* Elliott, 167 U. S., 409.

Chicago, B. & Q. R. R. Co. *vs.* Chicago, 166 U. S., 226.
Windsor *vs.* McVeigh, 93 U. S., 277.
People *ex rel.* Tweed *vs.* Liscomb, 60 N. Y., 559.
Ex parte Neilson, 131 U. S., 176.
In re Sawyer, 124 U. S., 200.
Ex parte Wilson, 114 U. S., 417.
Ex parte Bain, 121 U. S., 1.
Ex parte Fiske, 113 U. S., 713.

(*c.*) On habeas corpus the prisoner may show that the order under which he is held is void, and if it is, he is entitled to discharge.

While the writ of habeas corpus cannot be used to take the place of a writ of error or of an appeal for the purpose of correcting irregularities in the proceedings of another Court, yet the Court whose duty it is to issue the writ of habeas corpus may inquire whether the party is deprived of his liberty under an unauthorized process of the Court, and if there was no legal power to render the judgment or decree or to issue the process under which he is held, then it follows that there was no competent Court, and consequently, no judgment or process, and that he is held without due process of law, and is, therefore, entitled to his discharge.

This proposition may be stated without qualifications and without hesitation. The difficulty arises in its application in determining whether in a particular instance the judgment was void or the process unauthorized. Perhaps the question is discussed nowhere more fully than by Mr. Justice FIELD in *In re* Bonner, 151 U. S., where it was held that a person who had been convicted of larceny and sentenced to imprisonment for one year and the payment of a fine, with directions that he should be imprisoned in the State Penitentiary, was held to be entitled to be discharged upon habeas corpus because the statute under which he was sentenced, although it authorized the fine and imprisonment, did not authorize confinement in the penitentiary. It was there said :

"The person is ordered to be confined in the peniten-

"tiary, where the law does not allow the Court to send "him for a single hour. To deny the writ of habeas "corpus in such a case is a virtual suspension of it; and "it should be constantly borne in mind that the writ was "intended as a protection of the citizen from encroach- "ment upon his liberty from any source, equally as well "as from the unauthorized acts of Courts and Judges as "the unauthorized acts of individuals. The law of our "country takes care, or should take care, that not the "weight of a Judge's finger shall fall upon anyone except "as specifically authorized" (p. 259).

In the Matter of Fisk, 113 U. S., 713, where the petitioner was held under a commitment issued in proceedings for contempt in refusing to appear and submit to examination as a party before trial pursuant to an order made by the United States Circuit Court, in a case where such examination was not authorized by the practice in that Court, although it was by the practice in the New York Court from which the case had been removed, the prisoner was discharged. Mr. Justice MILLER in rendering the decision of the Court said:

"When, however, the Court of the United States un- "dertakes by its process of contempt to punish a man for "refusing to comply with an order which that Court had "no authority to make, the order itself being without "jurisdiction is void, and the order punishing for "the contempt is equally void. It is well set- "tled now in the jurisprudence of this Court "that when the proceeding for contempt in such a case "results in imprisonment this Court will, by its writ of "habeas corpus discharge the prisoner. It follows neces- "sarily that on a suggestion by the prisoner that for the "reason mentioned the order under which he is held is "void, this Court will, in the language of the statute, 'make "inquiry into the cause of the restraint of liberty.'"

Other illustrations of the power and duty of the Court to discharge upon habeas corpus where the prisoner is held under void proceedings are found in

In re Sawyer, 124 U. S., 417.
Ex parte Neilson, 131 U. S., 176.
Ex parte Bain, 121 U. S., 1.
In re Wilson, 140 U. S., 575.
Ex parte Rowland, 104 U. S., 608.

There are certain cases, however, which may be cited in this connection as though they lay down some principle inconsistent with the general proposition stated above. Among these are *Ex parte* Parks, 93 U. S., 18; *Ex parte* Yarbrough, 110 U. S., 657; *In re* Coy, 127 U. S., 731; *In re* Chapman, 156 U. S., 211.

In *Ex parte* Parks, it appeared that the prisoner was held under a conviction of the crime of forgery alleged to have been committed in proceedings in bankruptcy under the Bankruptcy Act. He applied to this Court for a writ of habeas corpus, which was denied upon the ground that the District Court had jurisdiction to determine whether the writing alleged to be a forgery was or was not a forgery within the meaning of the statute, and that upon habeas corpus this Court could not review the determination on that question of law. And to the same effect are the Matter of Yarbrough, *supra*, *In re* Coy, *supra*, and other cases.

But in the case at bar the question is whether the Court had jurisdiction to determine that the Receiver was entitled to possession of the property, and whether it had jurisdiction to determine that question by a summary proceeding. The cases cited would be like the case at bar if the questions there had been whether the offence charged was a crime at all, and if so whether the Court by summary proceedings could convict and punish for it.

Other case, of which *In re* Chapman, *supra*, is an instance, has reference to the rules recognized by this Court regarding original applications for the writ of habeas corpus and the discretion to be exercised by the Court in such instances.

The distinguishing feature in the case at bar is that the Court was without jurisdiction as to the subject matter as against the appellant, and that it was without jurisdiction to proceed in the form and manner in which it did proceed or to impose the penalty which it imposed. In each of these particulars there was not merely an irregularity but a want of jurisdiction. The Court had no authority to decide the thing which it did decide, to wit, that the Receiver was entitled to the possession of the property as against the appellant because

the appellant was not a party to that inquiry in any proper sense, or to decide that it could determine that question in a summary proceeding because there is a total absence of law authorizing the hearing and determination of such a question by a summary proceeding or to decide that it could fine and imprison until the fine was paid, because the limit of its power was to fine and imprison not exceeding three days. No decision which the Court could make upon any one of these three questions would bind the parties anywhere upon a collateral attack.

It is believed that any detailed examination of the cases cited above and others to which attention might be directed would be of little help to the Court.

III.

This Court has jurisdiction in each of these cases.

(1.) The judgment of the Court of Criminal Appeals is before this Court on the writ of error because in the proceeding in which it was rendered, the prisoner claimed a right, privilege and immunity under the Constitution of the United States (R. S. U. S., 709).

The issue on the habeas corpus proceedingwas whether the plaintiff in error was deprived of his liberty by due process. The defendant in error set up as a justification for the restraint of the plaintiff in error an order of commitment thereunder. The plaintiff claimed that neither of these constituted due process, and that he was therefore held in violation of his constitutional right.

In his petition he asserted that the judgment was not due process of law, and that he ought not to be and could not be lawfully imprisoned by such proceedings, nor could he be compelled to turn over his property in such a proceeding, for thereby he was deprived of trial by due course of law, and that the judgment and commitment were void and his detention illegal (Case 633, p. 5).

The instances in which this Court has considered the constitutional validity of statutes and judicial proceedings under which a person is held upon a writ of error in proceedings on the application of such person for discharge under the habeas corpus are familiar.

Leeper *vs.* Texas, 136 U. S., 462.
Kurtz *vs.* Moffitt, 115 U. S., 487.
In re Kemmler, 136 U. S., 436.

It is the settled law in Texas that a party has no right to an appeal in a contempt case.

State *vs.* Thurmond, 37 Texas, 341.
Crow *vs.* The State, 24 Texas, 12.
Casey *vs.* The State, 25 Texas, 364.
Jordon *vs.* The State, 14 Texas, 440.

So there is no remedy by appeal to this Court in proceedings for contempt.

Ex parte Chetwood, 165 U. S., 443.
Hayes *vs.* Fisher, 102 U. S., 121.
In re Debs, 158 U. S., 573.

The only remedy available to the plaintiff in error therefore was habeas corpus.

If we are right in our previous contention that the order of commitment was void, and that imprisonment under a void order is a deprivation of a person of his liberty without due process of law, it follows that a constitutional question was presented on the hearing for a discharge under the habeas corpus inasmuch as it appears that that contention was there made both in the pleadings and on the argument.

(2.) The appeal from the order of the United States Circuit Court for the Eastern District of Texas was properly taken to this Court under Section 5 of the Act of March 2d, 1891, which provides that an appeal or writ of error may be taken from the Circuit Court directly to the Supreme Court "in any case that involves the construc-" tion or application of the Constitution of the United " States." On the application for a discharge under the

writ of habeas corpus in the United States Circuit Court the constitutional question was presented on the petition (Case 632, p. 12), the appellant stated the proceedings under which he was held, the order, and commitment against him, and alleged that he was deprived of his liberty, and, if he submitted to the order, would also be deprived of his property without the due process of law in violation of the Constitution of the United States and the Fourteenth Amendment thereto, and to the right of the equal benefit of the law with citizens of the State contrary to the said Constitution, and that the order impairs the obligation of the appellant's contract with the Cemetery Company and was, therefore, contrary to the Constitution (p. 16). The Court thus acquired jurisdiction under § 753 R. S., U. S.

Here was a direct issue to test the validity of the order and commitment in the contempt proceedings upon the ground of their unconstitutionality. There, constitutionality was challenged in a proceeding where the question of constitutionality was practically the only question, and where, if the proceedings had been held unconstitutional, the judgment must necessarily have been just the reverse of what it actually was. There seems to be no doubt of the right of appeal in this case. Appeals directly from the United States Circuit Court to this Court from final adjudications in proceedings for habeas corpus dismissing the petition and remanding the petitioner are found

Palliser *vs.* U. S., 186; U. S., 236.
Ex parte Neilsen, 131 U. S., 176.
Ex parte Cuddy, 131 U. S., 280.
Horner *vs.* U. S., 143 U. S., 570.
Cuningham *vs.* Neagle, 135 U. S., 1.
N. Y. *vs* Eno, 155 U. S., 89.

Inasmuch as there is no right of appeal in proceedings for contempt either in the State Courts or to this Court, this Court having jurisdiction of the habeas corpus proceedings on this appeal will review the whole case.

Where this Court acquires jurisdiction in a case in which the application of the Constitution of the United States is drawn in question, it has jurisdiction of the entire

case and of all the questions involved in it, and not merely of the question of the constitutionality of the law of the United States.

Haner *vs.* U. S., 148 U. S., 570, 577.
Ekin *vs.* U. S., 142 U. S., 651.

Hence, if upon any of the grounds we have presented a constitutional question is presented the Court will review the entire proceeding and if the proceedings are illegal in other respects it will reverse the judgment of the Court below.

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